

BROOKS, PIERCE, McLENDON, HUMPHREY & LEONARD, L.L.P.

ATTORNEYS AT LAW

RALEIGH, NORTH CAROLINA

**MAILING ADDRESS
POST OFFICE BOX 1800
RALEIGH, N.C. 27602**

**OFFICE ADDRESS
SUITE 1600
FIRST UNION CAPITOL CENTER
150 FAYETTEVILLE STREET MALL
RALEIGH, N.C. 27601**

**TELEPHONE 919-839-0300
FACSIMILE 919-839-0304**

L.P. McLENDON, JR.
HUBERT HUMPHREY
EDGAR B. FISHER, JR.
W. ERWIN FULLER, JR.
JAMES T. WILLIAMS, JR.
WADE H. HARGROVE
M. DANIEL MCGINN
MICHAEL D. MEEKER
WILLIAM G. McNAIRY
EDWARD C. WINSLOW III
HOWARD L. WILLIAMS
GEORGE W. HOUSE
WILLIAM P.H. CARY
REID L. PHILLIPS
ROBERT A. SINGER
JOHN H. SMALL
RANDALL A. UNDERWOOD
S. LEIGH RODENBOUGH IV
WILLIAM G. ROSS, JR.
MARK J. PRAK
JILL R. WILSON
MARC D. BISHOP
JIM W. PHILLIPS, JR.
MACK SPERLING
JEFFREY E. OLEYNIK
MARK DAVIDSON
JAMES R. SAINTSING
JOHN W. ORMAND III
ROBERT J. KING III
STEVEN J. LEVITAS
V. RANDALL TINSLEY
JOHN R. ARCHAMBAULT
S. KYLE WOOSLEY

DANIEL M. SROKA
FORREST W. CAMPBELL, JR.
MARCUS W. TRATHEN
JEAN C. BROOKS
ELLEN P. HAMRICK
JAMES C. ADAMS, II
ALLISON M. GRIMM
ELIZABETH S. BREWINGTON
H. ARTHUR BOLICK II
NATASHA RATH MARCUS
JOHN M. CROSS, JR.
JENNIFER K. VAN ZANT
KEARNS DAVIS
DAVID W. SAR
KATHLEEN M. THORNTON
BRIAN J. McMILLAN
JENNIFER L. BOLICK
DAVID KUSHNER
DEREK J. ALLEN
ELIZABETH V. LAFOLLETTE
GINGER S. SHIELDS
HAROLD H. CHEN
COE W. RAMSEY
NATALIE KAY SANDERS
ROBERT W. SAUNDERS
DAVID SHUB
JENNIFER T. HARROD
CHARLES E. COBLE
JOHN M. DEANGELIS
CLINTON R. PINYAN
KATHRYN V. PURDOM
ANDREW KIRK SUSONG

FOUNDED 1897

AUBREY L. BROOKS (1872-1958)
W.H. HOLDERNESS (1904-1965)
L.P. McLENDON (1890-1968)
KENNETH M. BRIM (1898-1974)
C.T. LEONARD, JR. (1929-1983)
CLAUDE C. PIERCE (1913-1988)
THORNTON H. BROOKS (1912-1988)
G. NEIL DANIELS (1911-1997)

**GREENSBORO OFFICE
2000 RENAISSANCE PLAZA
230 NORTH ELM STREET
GREENSBORO, N.C. 27401**

**WASHINGTON OFFICE
601 PENNSYLVANIA AVENUE, N.W.
SUITE 900, SOUTH BUILDING
WASHINGTON, D.C. 20004**

DOCKET FILE COPY ORIGINAL

January 24, 2000

RECEIVED

JAN 24 2000

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A306
Washington, D.C. 20554

Re: Comments of Hearst-Argyle Television, Inc., MM Docket No. 99-325

Dear Ms. Salas:

Transmitted herewith on behalf of Hearst-Argyle Television, Inc. are an original and nine (9) copies of Comments for filing in the above-captioned proceeding.

If any questions should arise during the course of your consideration of this matter, it is respectfully requested that you communicate with this office.

Sincerely,

**BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.**

Mark J. Prak

Enclosures

No. of Copies rec'd
List ABCDE

024

Before the
Federal Communications Commission
Washington, D.C. 20554

RECEIVED
JAN 24 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Digital Audio Broadcasting Systems and)
Their Impact on the Terrestrial Radio)
Broadcast Service)

MM Docket No. 99-325

To: The Commission

COMMENTS OF HEARST-ARGYLE TELEVISION, INC.

Wade H. Hargrove
Mark J. Prak
David Kushner

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
First Union Capitol Center
Suite 1600 (27601)
Post Office Box 1800
Raleigh, North Carolina 27602
Telephone: (919) 839-0300
Facsimile: (919) 839-0304

Counsel to Hearst-Argyle Television, Inc.

January 24, 2000

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Digital Audio Broadcasting Systems and)	MM Docket No. 99-325
Their Impact on the Terrestrial Radio)	
Broadcast Service)	

To: The Commission

COMMENTS OF HEARST-ARGYLE TELEVISION, INC.

Hearst-Argyle Television, Inc. ("Hearst-Argyle"), by its attorneys, hereby files the following comments in response to the *Notice of Proposed Rule Making* ("Notice"), FCC 99-327, released November 1, 1999, in the above-captioned proceeding. The *Notice* seeks comment on the proper framework by which to create a new terrestrial digital audio broadcasting ("DAB") system, including, *inter alia*, whether the Commission should reallocate TV Channel 6 spectrum, 82-88 MHz, to DAB service at the end of the DTV transition period. Hearst-Argyle strongly opposes any proposal or plan that would reallocate TV Channel 6 spectrum.

Hearst-Argyle is a publicly-traded company that currently owns or manages 26 television stations, plus 2 additional satellite stations, and 7 radio stations in geographically diverse markets. The company's television stations reach approximately 17.5% of U.S. television households, making it one of the two largest non-network owned television station groups in the United States as well as one of the seven largest television groups overall as measured by audience delivered. Hearst-Argyle's principal shareholder is Hearst Broadcasting, Inc., which is, in turn, owned by The Hearst Corporation, a privately-held company with broad media interests, including newspapers and

publishing, broadcasting, and cable television networks.

Among the stations owned by Hearst-Argyle is WDSU(TV), New Orleans, Louisiana, an NBC affiliate in the nation's 41st largest market that currently broadcasts on NTSC Channel 6. WDSU has been assigned DTV Channel 43, but Hearst-Argyle is strongly considering whether it should elect to keep its existing Channel 6 allocation when the conversion to DTV is complete.

In the *Notice*, the Commission seeks comment on whether the spectrum at 82-88 MHz should be reallocated to DAB at the end of the transition to DTV.¹ Under no circumstances should part of the core DTV spectrum be reallocated away from television broadcasting. That was the *raison d'être* for designating a core of DTV spectrum in the first place.

Although the *Notice* states that the Commission has long considered whether a new frequency allocation for digital radio should use a portion of the existing television band,² in GEN Docket No. 90-357 the only consideration was "whether the *existing UHF television allocation* can, or should, be used to provide digital audio services in light of the need for this spectrum to accommodate ATV."³ The Commission has never suggested, heretofore, that any portion of the VHF band, especially Channel 6, be reallocated for DAB purposes. And, indeed, other than in the initial *Notice of Inquiry* in GEN Docket No. 90-357, the Commission did not further broach the reallocation of even UHF spectrum for DAB purposes.⁴

¹ See *Notice* at ¶ 41.

² See *id.* at ¶ 40.

³ Digital Audio Radio Services, *Notice of Inquiry*, FCC 90-281, 76 Rad. Reg. 2d (P & F) 1486 (1990), at ¶ 12 (emphasis added).

⁴ See Digital Audio Radio Services, *Notice of Proposed Rule Making and Further Notice of Inquiry*, FCC 92-466, 76 Rad. Reg. 2d (P & F) 1489 (1992); *Report and Order*, FCC 95-17, 76 Rad. (continued...)

The current suggestion that Channel 6 be reallocated for DAB purposes is totally at odds with the Commission's definitive decision, issued just over a year ago, to maintain Channel 6 as part of the essential core television spectrum:

We continue to believe that it is important to maintain the availability of channel 6 for television service. Channel 6 has advantageous propagation properties and has proven very desirable for television operation—as indicated by the fact that there are currently more than 55 NTSC television stations [now 57] on this channel. We believe it would be undesirable to remove channel 6 from the core spectrum or to impose additional restrictions on use of this channel for DTV service after the transition. In this regard, we do not find that the additional opportunities for increasing FM noncommercial coverage would outweigh the costs of eliminating channel 6 from TV service. While we recognize that the use of channel 6 for television service necessitates some limitations on stations in the noncommercial FM radio service, we also note that FM noncommercial radio services in the 88-92 MHz band and NTSC television services on channel 6 have operated successfully in many areas. We further note that the robust nature of the DTV signal with regard to interference and the lower transmission power requirements of [the] DTV system may enhance the co-existence of these services and may provide noncommercial FM stations with additional opportunities to increase their coverage.⁵

This reasoning is every bit as applicable to the instant circumstance of DAB as it was to NCE FM service. Thus the proposed DAB service will not alter the “advantageous propagation properties” of Channel 6 nor undermine the desirability of this spectrum band for television operation. The

⁴(...continued)

Reg. 2d (P & F) 1477 (1995) (“*Allocation Order*”); Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, *Notice of Proposed Rule Making*, FCC 95-229, 6 Comm. Reg. (P & F) 2151 (1995); *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rule Making*, FCC 97-70, 6 Comm. Reg. (P & F) 978 (1997).

⁵Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, *Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders*, FCC 98-315, 14 Comm. Reg. (P & F) 522 (1998) (“*Second Reconsideration Order of Fifth and Sixth Reports*”), at ¶ 57.

potential for DAB, standing alone, cannot vitiate the “undesirab[ility] [of] remov[ing] channel 6 from the core spectrum.” Nor do the “additional opportunities for increasing FM [DAB] coverage . . . outweigh the costs of eliminating channel 6 from TV service.”

Throughout its DTV proceeding, as the Commission has acknowledged, “[o]ne of our principal concerns [was] to provide broadcasters with the *best possible spectrum* for DTV operation.”⁶ Ultimately, after much deliberation and public input, the Commission determined that the low VHF spectrum, including Channel 6, should be made part of the core DTV spectrum, which would include all current channels from 2 through 51.⁷ The Commission was persuaded that the favorable propagation characteristics of low VHF, the elimination of planning uncertainties, the reduction in second channel moves, the promotion of additional competition and diversity in the provision of DTV by increasing the availability of channels for new stations and networks, the increased flexibility to address new technical information on DTV channel performance, the insurance of sufficient spectrum to eliminate DTV-to-DTV adjacent channel interference situations, and the reduction of any impact on low power operations all supported the inclusion of the five low VHF channels in the core DTV spectrum.⁸ The Commission was well aware that there was no engineering evidence indicating that the low VHF channels were unsuitable for DTV operation, and,

⁶ Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, *Sixth Report and Order*, FCC 97-115, 7 Comm. Reg. (P & F) 994 (1997), at ¶ 82 (emphasis added).

⁷ See Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order*, FCC 98-24, 11 Comm. Reg. (P & F) 634 (1998) (“*Reconsideration Order of Sixth Report*”), at ¶ 42.

Channel 37 (608-614 MHz) is not used for broadcast television (either NTSC or DTV) as it is currently used for radio astronomy research.

⁸ See *Reconsideration Order of Sixth Report* at ¶¶ 43-44.

in fact, that the field tests of the DTV system conducted in Charlotte, North Carolina, showing the superior propagation characteristics of Channels 2-6 for DTV service were actually conducted on Channel 6.⁹ It is difficult, if not impossible, to see how the Commission can reconcile its current consideration of taking away 20% of the low VHF core DTV spectrum for DAB—indeed, the 20% that was the actual engineering testbed for low VHF DTV operations—in light of the record evidence and policy rationales advanced in the Commission’s DTV proceeding.

The irrationality and capriciousness of this proposal is made manifest by the Commission’s own admission that a “Channel 6 allocation could *significantly delay* the introduction of DAB.”¹⁰ As the Commission properly concedes, the earliest the 82-88 MHz band could be made available for DAB purposes would be 2007, but the “exact date of spectrum availability . . . could be *significantly later*.”¹¹ Terrestrial digital audio services have been in the works for the last decade. Surely it cannot be in the public interest to delay their introduction for another decade while simultaneously creating negative ramifications for DTV broadcasters.

Frankly, Hearst-Argyle is dumbfounded by the Commission’s consideration of removing Channel 6 from the core DTV spectrum. While it is true that the DTV Table of Allotments contains only one Channel 6 allotment, the 57 existing analog television stations on Channel 6 could all choose to revert to Channel 6 after the transition to DTV is complete.¹² The potential for 58 DTV

⁹ See *id.* at ¶¶ 37, 42.

¹⁰ *Notice* at ¶ 41 (emphasis added).

¹¹ *Id.* (emphasis added); see also *id.* at n.90 (noting the myriad provisions for extending the date for terminating analog service).

¹² In the *Sixth Report and Order*, the Commission stated:

(continued...)

stations on Channel 6 nationwide is far more than the average number of DTV stations per core channel. Moreover, the benefits of the longer range propagation characteristics and lower power requirements of Channel 6 are well-recognized by broadcasters. It seems clear that a substantial number of broadcasters will want to revert to Channel 6.

However, what is most important—and disturbing—about the Commission’s suggestion is that Hearst-Argyle and other broadcasters thought the issue of Channel 6’s inclusion in the core DTV spectrum was well-settled. The Commission has thoroughly examined the public interest benefits of retaining Channel 6 in the core spectrum, and an essential component of the Commission’s *ratio decidendi* to include the low VHF channels, including Channel 6, in the core spectrum, as demonstrated above, was *to remove uncertainties* about whether these channels would remain allocated to television service after the transition to DTV is complete.¹³ The Commission’s suggestion in the instant *Notice* completely undercuts the *Reconsideration Order of Sixth Report* and the *Second Reconsideration Order of Fifth and Sixth Reports* and re-creates the very cloud of uncertainty those orders intended to dissipate. At some point, there must be an end to administrative uncertainty. That point came, by the Commission’s own words and actions, with the *Reconsideration Order of Sixth Report* and especially the *Second Reconsideration Order of Fifth and*

¹²(...continued)

We also will allow broadcasters, wherever feasible, to switch their DTV service to their existing NTSC channels at the end of the transition if they so desire. Such channel switches would be permitted provided that the station’s existing channel is within the final DTV core spectrum.

Sixth Report and Order at ¶ 84.

¹³ See *Reconsideration Order of Sixth Report* at ¶¶ 42-43.

Sixth Reports. The new uncertainty the Commission is attempting to introduce amounts to arbitrary and capricious agency action. The Commission needs to declare, once and for all, that the 82-88 MHz band will remain allocated to the television broadcasting service and nothing else.

Moreover, there is no countervailing technical or policy consideration that outweighs the need for administrative finality and certainty, the many benefits of including Channel 6 in the core DTV spectrum, or the potential for a decade-long delay in introducing terrestrial DAB service. As the Commission itself states, “[t]he new spectrum approach would permit the use of a DAB system that is completely independent of the existing analog AM and FM radio systems.”¹⁴ Channel 6 spectrum is spectrum that would be new to radio broadcasting and thus it is independent of the existing analog radio systems. Therefore, there is no inherent reason to prefer the 82-88 MHz band over some other new spectrum, let alone a reason that trumps all the contrary policy rationales.

Both consumers and radio broadcasters will have to purchase new equipment to utilize DAB services, and it makes no significant substantive difference whether the transmitters or receivers are keyed to the 82-88 MHz band or some other new spectrum allocated for DAB purposes. There is simply no conceivable reason why “[a]ny reallocation of the 82-88 MHz band for DAB service should facilitate the transition to a final DAB spectrum plan”¹⁵ any more than the allocation of any other new spectrum would facilitate such a transition. Similarly, there is no rational reason to believe that a “common FM/DAB radio receiver design across the entire 26 MHz of spectrum from 82-108 MHz” should “facilitate the eventual conversion of the existing FM stations to DAB

¹⁴ *Notice* at ¶ 42.

¹⁵ *Id.* at ¶ 43.

operation.”¹⁶ The spectrum allocated for both analog and digital television service is not contiguous—indeed, not even the core DTV spectrum is contiguous—yet television receivers work just fine, and the underlying spectrum allocation is transparent to consumers. As far as Hearst-Argyle is aware, it never even occurred to the Commission that a common analog TV/DTV television receiver design across, say, the middle and upper UHF channels (i.e., Channels 38-69) from 614-806 MHz combined with contiguous spectrum from 806-1016 MHz (for relocated Channels 2-36) would somehow facilitate the eventual conversion of existing analog TV stations to DTV operation. Moreover, the alleged benefit of reallocating the 82-88 MHz band to radio broadcasting to address concerns raised by NCE FM broadcast interests about potential interference and protection requirements of Channel 6 television is a red herring.¹⁷ Channel 5, at 76-82 MHz, is contiguous with Channel 6, and, were radio broadcasting to occupy the 82-88 MHz band, then the same interference and protection concerns would manifest themselves anew, except they would be with regard to Channel 5.¹⁸

Hearst-Argyle is particularly disturbed by the implication of the *Notice* that the Channel 6 give-away is nothing but a back-handed way to implement a new LPFM service.¹⁹ The Commission is in the midst of implementing the momentous change to DTV and on the threshold of implementing a similar momentous change to terrestrial DAB, yet it appears it would be willing to

¹⁶ *Id.* at ¶ 45.

¹⁷ *See id.* at ¶ 42 n.91 (noting concerns of NCE FM broadcast interests (concerns that have already been rejected by the Commission in its DTV proceeding)).

¹⁸ In this context, it is worth noting that Channel 5, like Channel 6, is part of the core DTV spectrum.

¹⁹ *See Notice* at ¶ 49.

jeopardize aspects of both so that it can implement a service that it essentially already abandoned for efficiency reasons 20 years ago.²⁰ Hearst-Argyle fails to understand the reasons for the unexplained inconsistencies in recent Commission decisions. First, the Commission says that Channel 6 is part of the core DTV spectrum. Second, the Commission states—unequivocally—its intention not to create a LPFM service “on any spectrum beyond that which is currently allocated for FM use.”²¹ Yet now the Commission appears willing to break both promises so that it may take away the one to give to the other. In addition, Hearst-Argyle further fails to understand why, if the Commission is now intent on allocating new spectrum for LPFM purposes, in contravention of its previously stated intent, that it must be the Channel 6 spectrum band that suffers. Surely if the Commission believes—but without any record evidence at this point—that the public interest would be served by allocating new spectrum for LPFM as part of some “complementary digital transition strateg[y]”²² with DAB, that benefit can be achieved just as well with a band of spectrum that does not destroy a part of the core DTV spectrum. Broadcasters have invested far more in DTV than radio pirates ever will in LPFM.

Conclusion

For the foregoing reasons, Hearst-Argyle, as the owner of one television station broadcasting on Channel 6 and the owner or manager of seven radio stations that looks forward to the advent of

²⁰ See Noncommercial Educational FM Broadcast Stations, *Second Report and Order*, FCC 78-384, 44 Rad. Reg. 2d (P & F) 235 (1978); Noncommercial Educational FM Broadcast Stations, *Memorandum Opinion and Order*, FCC 78-919, 44 Rad. Reg. 2d (P & F) 1685 (1979) (“*Reconsideration of Second Report and Order*”).

²¹ Notice at ¶ 49 (quoting *LPFM Notice*, 14 FCC Rcd at 2477).

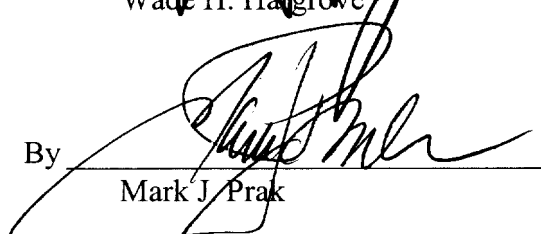
²² *Id.*

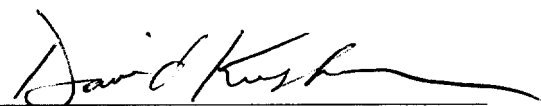
DAB, respectfully urges the Commission to abandon any notion of reallocating the Channel 6 spectrum band for DAB purposes and to re-emphasize its commitment to Channel 6 as part of the core DTV spectrum.

Respectfully submitted,

HEARST-ARGYLE TELEVISION, INC.

By _____
Wade H. Hargrove

By _____
Mark J. Prak

By _____
David Kushner

Its Attorneys

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
First Union Capitol Center
Suite 1600 (27601)
Post Office Box 1800
Raleigh, North Carolina 27602
Telephone: (919) 839-0300
Facsimile: (919) 839-0304

January 24, 2000